

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

BILL: SB 830

SPONSOR: Senator Geller

SUBJECT: Privileged Communications

DATE: March 17, 1999

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Forgas</u>	<u>Johnson</u>	<u>JU</u>	<u>Favorable</u>
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

## I. Summary:

There is currently no parent-child privilege which permits a child or parent to refuse to disclose, or prevent another from disclosing, certain communications intended to be made in confidence. This bill creates a new evidentiary privilege for communications between parent and child in certain circumstances.

Under the proposed legislation, either the parent, child, or the guardian of either of them may assert the privilege. However, there will be no parent-child privilege in the following instances:

- Proceedings brought by one family member against another family member;
- A prosecution or other criminal proceeding involving the commission of a crime or delinquent act or in an investigation of murder or sexual battery; and
- Department of Juvenile Justice or Department of Children and Family Services matters as part of established or institutional proceedings relating to the well-being of the child or parent, including, but not limited to, matters alleging child abuse, child neglect, abandonment, nonsupport by a parent, or domestic violence against a parent.

The privilege may be waived by: (1) the express consent to disclose by either the parent or the child; (2) the parent or child who made the communication; or (3) the failure to object to a request for the contents of the communication.

The act is effective July 1, 1999.

This bill creates section 90.5045 of the Florida Statutes.

## II. Present Situation:

Under s. 90.501, F. S., no person may assert an evidentiary privilege or refuse to appear as a witness unless it is specifically provided for in statutory law. This section abolishes all common law privileges existing in Florida and makes the creation of privileges dependent upon legislative action or the Florida Supreme Court's rule-making power. The Florida Evidence Code, Chapter 90, F.S., recognizes the lawyer-client privilege, the psychotherapist-patient privilege, the sexual assault counselor-victim privilege, the domestic violence advocate - victim privilege, the husband-wife privilege, the clergy privilege, the accountant-client privilege, and the trade secret privilege.

Section 90.501, F.S., recognizes that certain sections of the Florida Statutes, other than the Evidence Code, provide that certain matters are privileged. For example, s. 396.112, F.S., provides a privilege for certain records made during the treatment of alcoholics; s. 394.459 (9), F.S., provides a privilege for patients hospitalized under the Baker Act; s. 502.222, F.S., provides a privilege for certain information obtained during the inspection of dairy farms and milk plants; and s. 316.066(4), F.S., provides a privilege for accident reports.

The privileges included in the Evidence Code generally protect communication made during a privileged relationship. The privilege generally exists on behalf of the individual seeking the aid or benefit from one of the specified groups. For example, the attorney-client privilege exists to protect the client and belongs to the client. Generally, only confidential communications are protected and other matters are not.

At the present time, there is no statutory privilege concerning parent - child communications.

The current privilege most similar to a parent-child privilege is the husband-wife privilege. The marital privilege is recognized to strengthen marital harmony. Section 90.504(1), F.S., recognizes that a party to a valid marriage has a privilege to prevent the disclosure of "communications which were intended to be made in confidence between the spouses when they were husband and wife." Thus, the husband-wife privilege belongs to both spouses and either may assert it. *Smith v. State*, 344 So.2d 915, 919 (Fla 1 DCA 1977), cert denied, 353 So.2d 679.

Either spouse who is testifying as a witness may assert the privilege to prevent disclosing privileged matters. A spouse who is a party to an action may also assert it in order to prevent the other spouse from testifying to privileged matters. Accordingly, if a husband calls his wife as a witness, the wife may assert the privilege despite the husband's wishes that the testimony be disclosed. If the wife is called as a witness to testify against the husband, the husband could assert the privilege despite the willingness of the wife to testify.

Section 90.504(3), F.S., specifies three situations in which the husband-wife privilege does not exist, although all the other necessary requirements are satisfied:

- When one spouse sues the other in a civil action, s. 90.504(3)(a), F.S., provides that the privilege does not exist as to communications relevant to the action because, when spouses are adverse parties in litigation, no social policy is furthered by recognizing the privilege.

- When one spouse is charged with a crime committed against the person or property of the other spouse, s. 90.504(3)(b), F.S., provides that the privilege is not recognized. There is no justifiable reason to allow the privilege to obstruct justice.
- In a criminal case an accused should be able to offer any relevant testimony in his or her own defense. Therefore, s. 90.504(3)(c), F.S., recognizes that a criminal defendant who calls his or her spouse as a witness is entitled to the benefit of testimony from that spouse and that the privilege may not be asserted by the witness.

As of this date, only four states have deemed it necessary to protect from disclosure, in any manner, confidential communications between children and their parents. New York is the only state which has judicially recognized a limited parent-child privilege. However, the privilege has only been recognized by inferior New York courts and it is applied sparingly. Idaho and Minnesota have recognized a variant of the parent-child privilege through statute. *See* Idaho Code § 9-203(7) (1990 & Supp. 1995); Minn. Stat. §595.02 (1)(j) (1998 & Supp. 1996). Massachusetts law prevents a minor child from testifying against a parent in a criminal proceeding. However, the statute does not go so far as to recognize a parent-child testimonial privilege; rather it is best described as a witness disqualification rule. The Massachusetts statute only bars a minor child, under certain circumstances, from testifying against a parent and does not extend to children of all ages in all circumstances. *See* Mass. Gen. L. Ch. 233, §20 (1986 & Supp. 1996).

The United States Court of Appeals, Third Circuit, exhaustively explored the parent-child privilege in *In re Grand Jury*, 103 F.3d 1140 (3d Cir. 1997). The court concluded the parent-child privilege was not warranted as confidentiality was not essential to a successful parent-child relationship and any injury to the parent-child relationship caused by compelled testimony as to confidential communications would be necessarily and substantially outweighed by the benefit to society of obtaining all relevant evidence in a judicial proceeding. Moreover, the court found the child-privilege would be impractical as a parent owes a duty to a child to nurture and guide him, which might require disclosure of the child's confidential communications. The court noted that eight federal courts of appeals have rejected such a privilege, none of the remaining federal courts of appeals have recognized it, and every state supreme court that has addressed the issue has rejected the privilege.

### **III. Effect of Proposed Changes:**

The bill creates a parent-child privilege that would allow a child or parent to refuse to disclose, and to prevent another from disclosing, communications which were intended to be made in confidence between the parent and the child. The privilege exists and continues whether or not the parent and child reside together. The privilege may be claimed by the child, parent or guardian or conservator of either. The privilege may be waived by the express consent of the parent or child entitled to the privilege. It also may be waived by the failure of either to object when the contents of a communication are demanded.

The bill expressly provides that no such privilege exists in the following instances:

- A proceeding brought by or on behalf of one family member against another family member;
- A prosecution or other criminal proceeding involving the commission of a crime or delinquent act or in an investigation of murder or sexual battery; and
- Department of Juvenile Justice or Department of Children and Family Services matters as part of established or institutional proceedings relating to the well-being of the child or the parent, including, but not limited to, matters alleging child abuse, child neglect, abandonment, nonsupport by a parent, or domestic violence against a parent.

The bill does not define the terms parent and child. It is not known whether parent would include step-parent or grand-parent. Likewise, it is not known whether child would include an adopted child or a step-child. Additionally, the bill does not specify whether the privilege is valid when another parent or child is present at the time of the privileged communication. Furthermore, the term communication is not defined so it is unknown whether written forms of communication are included within the privilege.

The current language is also unclear as to whether the parent or child may refuse to disclose, or prevent the other from disclosing, communications intended to be held in confidence if either the child or the parent is willing to waive the privilege. This ambiguity may result in intense pressure being applied on the parent or child to waive the privilege.

The exceptions do not appear to be broad enough to cover proceedings concerning domestic violence where the child may be a witness to violence between the parents but unable to testify under the proposed bill.

Even though there are exceptions to the privilege for delinquency proceedings at Department of Juvenile Justice institutional proceedings, the Department notes that the exemption could create potential problems. For example, while there is an exemption for the prosecution or other criminal proceeding involving the commission of a crime or delinquent act, proceedings relating to a delinquent act are delinquency proceedings, not necessarily criminal proceedings. Additionally, there is no expressly stated exception for “child in need of services” judicial proceedings. Without such an exemption, the parent might be precluded from explaining to the court the behaviors which make the child in need of services.

Since criminal proceedings are generally excluded from the privilege, the proceedings most likely to be affected are civil proceedings for negligence, intentional torts and commercial disputes.

Finally, the bill provides an effective date of July 1, 1999. However, it does not specify how it will be applied. Absent clear legislative intent, a substantive statute will only apply prospectively whereas a procedural or remedial statute operates retroactively. See *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So.2d 55, 61 (Fla. 1995); *Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So.2d 1352 (Fla. 1994). Statutes that relate only to procedure or remedy generally apply to all pending cases. See *Gupton v. Village Key & Saw Shop, Inc.*, 656 So.2d 475, 477 (Fla. 1995). Procedural statutes concern the means and methods to apply and enforce duties and rights. *Alamo at 1358*.

The bill appears to be procedural in nature and, accordingly, will probably apply to all pending cases on July 1, 1999.

**IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

**V. Economic Impact and Fiscal Note:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.